No. 92-8

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BODINE'S INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, and MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children, ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated, EDWARD BODEN, SR., EDWARD BODEN, JR., ROGER J. WALSH, JR., DOMINICK'S FINER FOODS, INC., CERTIFIED GROCERS WAREHOUSE, INC., and TREASURE ISLAND FOODS, INC., individually and as representatives of a class; and the KROGER CO.,

Respondents.

Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

PETITION FOR WRIT OF CERTIORARI

GERALD D. SKONING
Counsel of Record
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorney for Petitioner

Of Counsel:

HAROLD C. WHEELER
KATHLEEN M. DILLON
WARREN VON SCHLEICHER
LINDA P. KURTOS
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether a state court in a nationwide class action, consistent with the due process clause of the Fourteenth Amendment, can apply fluid recovery even though numerous federal circuit courts of appeal have already held fluid recovery to be unconstitutional?

2. Whether a state court in a nationwide class action, consistent with the due process clause of the Fourteenth Amendment, can apply fluid recovery to determine aggregate damages to the class as a whole, even though (1) class members may not be notified of the pendency of the action, if at all, until after both liability and aggregate damages are determined; (2) many class members have no contacts with the forum state; and (3) many of the claims arose in other states and the forum has no significant interest in them, in violation of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)?

3. Whether a state court in a class action, consistent with the due process clause of the Fourteenth Amendment, can apply fluid recovery for penal purposes without according litigants their rights under the Fifth and Sixth Amendments?

4. Whether a state court in a class action, in an attempt to fulfill state objectives, consistent with the Supremacy Clause of Article VI, can apply fluid recovery to relieve class members of their burden of proving individual damages in an action for civil damages under Section 1964 of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1964, when that statute provides relief only when such damages can be established?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT	4
I. THE COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS APPELLATE COURT HAS EMPLOYED A MECHANISM—FLUID RECOVERY—THAT HAS BEEN FOUND BY NUMEROUS FEDERAL COURTS TO VIOLATE DUE PROCESS	4
II. FLUID RECOVERY VIOLATES THE DUE PROCESS RIGHTS OF BOTH PETITIONER AND ABSENT CLASS MEMBERS BY FAILING TO PROVIDE NOTICE	9
III. THE ILLINOIS APPELLATE COURT'S APPROACH IS ENTIRELY INCONSISTENT WITH THIS COURT'S PRECEDENT IN *PHILLIPS PETROLEUM v. SHUTTS*	10
IV. THE COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS APPELLATE COURT'S APPLICATION OF FLUID RECOVERY VIOLATES PETITIONER'S DUE PROCESS RIGHTS BY PUNISHING PETITIONER AS A CRIMINAL WITHOUT THE NECESSARY CONSTITUTIONAL PROCEDURAL SAFEGUARDS	13

V.

IMPOSITION OF FLUID RECOVERY BY THE ILLINOIS APPELLATE COURT SUBSTANTIALLY ALTERS THE SUBSTANCE OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT IN VIOLATION OF THE SUPREMACY CLAUSE 17

VI.

THE U.S. SUPREME COURT MAY PROPERLY EXERCISE ITS JURISDICTION OVER THIS CASE UNDER 28 U.S.C. § 1257 22

A. The Decisions of the Illinois Supreme Court and the Illinois Appellate Court Declaring Fluid Recovery to Be Constitutional Finally Resolve that Federal Issue 24

B. Petitioner May Prevail on Nonfederal Grounds, Thereby Mooting the Federal Issue 25

C. Reversal of the Decision of the Illinois Appellate Court On Fluid Recovery Would End This Litigation 26

D. The Failure to Review the Decision of the Illinois Appellate Court Would Seriously Erode Federal Policy 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases	PAGE
Brown v. W. R. Co. of Alabama, 339 U.S. 294 (1949)	19
Browning Ferris Indus. v. Kelco, 492 U.S. 257 (1989)	13 n.4
California v. Sierra Club, 451 U.S. 287 (1981)	18, 19
Cicelski v. Sears Roebuck & Co., 132 Mich. App. 298, 348 N.W.2d 685 (1984)	5, 8
Citizens & So. Nat. Bank v. Bougas, 434 U.S. 35 (1977)	25 n.8
Client Follow-Up Co. v. Hynes, 105 Ill. App. 3d 619, 434 N.E.2d 485 (1982)	9, 10
Construction & Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963)	23
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	23, 24, 25, 26
Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952)	19
Eisen v. Carlisle & Jacquelin, 479 F.2d 1505 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974)	6, 7, 8, 14
Felder v. Casey, 487 U.S. 131 (1988)	19
Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982)	20
Free v. Bland, 369 U.S. 663 (1962)	21
In re Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974)	7, 21
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	21

Jones v. Reagan, 696 F.2d 551 (7th Cir. 1983) ... 13 n.4

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) . 15, 16

Michigan v. Long, 463 U.S. 1032 (1983) 20 n.5

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 9, 10

Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), *cert. denied sub nom. Morgan v. Automobile Mfrs. Assoc.*, 414 U.S. 1045 (1973) 22

Pacific Mutual Life Ins. v. Haslip, ____ U.S. ____, 111 S.Ct. 1032 (1991) 13 n.4

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) ... 24

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 10, 11, 26

Ridgway v. Ridgway, 454 U.S. 46 (1981) 21

Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982) 4, 5, 8, 20

Southland v. Keating, 465 U.S. 1 (1984) 24

Thompson v. Thompson, 484 U.S. 174 (1988) .. 19

Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961) 12

Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) 6, 7, 21

Constitution and Statutes

U.S. Const. Art. VI, cl. 2 ..... 18, 20
U.S. Const. amend. V 16
U.S. Const. amend. XIV 9
18 U.S.C. § 1964 (1988) 17
28 U.S.C. § 1257 (1988) 22, 23, 25 n.8
Ark. Code Ann. §§ 4-88-101 through 4-88-112 (Michie 1991) 12 n.3
Ga. Code Ann. §§ 10-1-390 *et seq.* (1982) 12 n.3
Ill. Rev. Stat. ch. 110A, ¶ 315 (1989) 24
Ill. Rev. Stat. ch. 110A, ¶ 317 (1989) 24
N.Y. Gen. Bus. Law § 349 (McKinney 1988) ... 12 n.3

Other Authorities

4 C.A.R. 3, 11-16, 4 C.A.R. 181, 187-194, and 4 C.A.R. 342-346 (1975) 22 n.6
LaFave & Scott, *Criminal Law* (1972) 14
Senate Report of the Committee on the Judiciary, Sen. Rep. No. 617, 91st Cong., 1st Sess. 81-82 (1969) 17, 18, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BODINE'S INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, and MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children, ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated, EDWARD BODEN, SR., EDWARD BODEN, JR., ROGER J. WALSH, JR., DOMINICK'S FINER FOODS, INC., CERTIFIED GROCERS WAREHOUSE, INC., and TREASURE ISLAND FOODS, INC., individually and as representatives of a class; and the KROGER CO.,

Respondents.

Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

PETITION FOR WRIT OF CERTIORARI

To The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner Bodine's, Inc. ("Petitioner")[1] prays that a writ of certiorari issue to the Illinois Appellate Court, First Judicial District:

---

[1] Petitioner's statement pursuant to Supreme Court Rule 29.1 is set forth in the Appendix at page A56.

OPINIONS BELOW

The opinion of the Illinois Appellate Court is set forth in the Appendix at page A1. The unpublished order of the Circuit Court of Cook County, First District, is set forth at page A17 of the Appendix. The order of the Illinois Supreme Court denying the petition for appeal is set forth at page A16 of the Appendix.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on December 26, 1991, affirming the ruling of the Circuit Court of Cook County, First District, Chancery Division, dated December 7, 1990. The Illinois Supreme Court denied a petition to appeal as a matter of right, or alternatively, for leave to appeal, on March 27, 1992. The jurisdiction of the Court is under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

In July, 1989, this nationwide class action was filed against the manufacturer and retailer of orange juice labeled as 100% pure, but allegedly containing substitutes. The Third Amended Complaint (the "Complaint") (A20) seeks damages for economic loss on behalf of each putative class member for each allegedly adulterated product that he may have purchased under theories of Illinois common law fraud, the Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121-1/2, ¶ 280 (1989) and similar acts in every other state, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1988) ("RICO").

The Complaint claims that Petitioner manufactured the allegedly adulterated juice from 1978 to 1985,[2] and that the product was marketed in at least thirty-six states to more than 100 supermarket chains under fifty brand names. Many supermarkets bought this juice, along with juice from other manufacturers, which they then sold under their house labels. Therefore, most of the juice Petitioner sold could not be identified by the consumer as being Petitioner's juice. Moreover, the nationwide class is, and likely will remain, utterly unidentifiable. Counsel for the class and the Illinois courts have attempted to bypass this problem by creating a "fluid recovery."

As envisioned by the lower courts, fluid recovery employs various mechanisms to assess the damage to the class as a whole, and then to distribute this damage fund in a manner most likely to benefit the injured population. Thus, in this case, liability and damages will be determined solely by examining Petitioner's records. Moreover, fluid recovery will dispense with giving notice of the pending action to plaintiff class members until after liability is determined, and class members need not make individual claims until that time.

On December 7, 1990, the trial court certified the following question for review:

> Whether what is commonly known as "fluid recovery" (various mechanisms involving the assessment of damages to the class as a whole followed by its

---

[2] Petitioner, Bodine's, Inc., was purchased in 1985 by McCain USA, Inc. McCain USA had no knowledge of or involvement in the conduct of the individual defendants—former directors, officers and shareholders, Edward Boden, Sr., Edward Boden, Jr. and Roger J. Walsh. Further, McCain cooperated fully with federal authorities' investigation of the former owners. There are *no* allegations that the current owner of Bodine's, Inc. engaged in any wrongdoing.

> distribution in the manner most likely to result in benefit to the injured population) is permissible in a class action in Illinois.

The trial court noted that thousands or millions of claims would be defeated if fluid recovery were not available as a means to certify the class. (Trial Ct. Order, A18). The Illinois Appellate Court granted leave to appeal and upheld the trial court's certification of the class, relying heavily on the *dicta* of *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982). The court held that fluid recovery was permissible and constitutional in an Illinois class action suit. On March 27, 1992, the Illinois Supreme Court denied Petitioner's petition for appeal.

ARGUMENT

I.

THE COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS APPELLATE COURT HAS EMPLOYED A MECHANISM—FLUID RECOVERY—THAT HAS BEEN FOUND BY NUMEROUS FEDERAL COURTS TO VIOLATE DUE PROCESS

The decision of the Illinois Appellate Court is the first Illinois case expressly to uphold and implement fluid class recovery against constitutional challenge. Unless this Court exercises review at this point, there is a serious danger that the state court's decision will stand as precedent for future litigation, will encourage lawyers to file nationwide class actions, and will promote the perception that the state judiciary may do what the federal judiciary must not do—infer federal statutory remedies which Congress never provided. Numerous federal courts have found fluid class recovery unconstitutional. This Court should grant review to preserve consistency in the federal courts' decisions and prevent uncertainty in the application of federal law. Otherwise, future plaintiffs will engage in forum

shopping to avail themselves of one state's interpretation of federal law, avoid another state's interpretation, and evade what will be received as the more limited power of the federal judiciary.

The Illinois courts adopted fluid recovery "to avoid expected manageability problems" in large class actions, by calculating and distributing damages through the following mechanism:

> "(1) the amount of damages incurred by the *class as a whole* is determined in a single adjudication, creating a damage fund; (2) individual member claimants *capable* of proving valid claims obtain their share of the fund; and (3) the unclaimed portion of the fund is applied to the class's benefit. [Citation.]"
>
> The third procedural step is the actual fluid recovery, which commonly assumes one of two forms. The remainder of the fund is: (1) distributed through the market, usually in the form of reduced charges, or (2) used to fund a project which will likely benefit class members. *Simer*, 661 F.2d at 675; *Cicelski*, 132 Mich. App. at 305, 348 N.W.2d at 689; see generally Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1516-23 (1976).

(App. Ct. Op., A12-13, quoting *Cicelski v. Sears Roebuck & Co.*, 132 Mich. App. 298, 304-05, 348 N.W.2d 685, 689 (1984)) (emphasis added).

Fluid recovery employs a method of calculation which wholly relieves class members of the initial burden of proving individual damages. Rather, damages to society as a whole are calculated and distributed, absent individual proof of harm. In fact, under this mechanism, no individual claimant would even be required to show an injury until *after* liability and damages have been assessed against Petitioner. Potentially, *no individual* injury need ever be proven, yet damages would still be granted, because the public would receive any portion of the "fund"

unclaimed by "claimants *capable* of proving valid claims." (A.13). This unclaimed portion could conceivably encompass the entire fund. Consequently, Petitioner is punished, even though injury to no individual plaintiff may ever be proven.

For those reasons, numerous courts of appeal have found fluid recovery to violate due process. The leading case finding fluid class recovery to be unconstitutional is *Eisen v. Carlisle and Jacquelin*, 479 F.2d 1005 (2nd Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). *Eisen* was an antitrust action brought on behalf of all odd-lot investors against two brokerage firms and the New York Stock Exchange. The plaintiff sought to maintain the action as a class of such investors during a four-year period. The Second Circuit refused to certify the class, finding it utterly unmanageable. *Eisen*, 479 F.2d at 1008.

In denying the class, the court unequivocally rejected the "fluid recovery" plan designed by the district court to control an otherwise unmanageable class. The Court of Appeals found fluid recovery to be a "fantastic procedure" and an "unconstitutional violation of the requirement of due process of law." It held the " 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Id.* at 1018.

The Fourth Circuit is in accord with *Eisen* in finding fluid recovery unconstitutional. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (citing *Eisen*, 479 F.2d at 1018). The *Windham* plaintiffs sought a class certification of growers of flue-cured tobacco in South Carolina based on allegations of antitrust violations. *Windham*, 565 F.2d at 64. The court, however, refused to certify the class, finding the action unmanageable. In light of the magnitude of the class size, the court found that "computation of damages would be a complex, highly individualized task, imposing

an intolerable burden on the judicial system." *Windham*, 565 F.2d at 70.

Fluid recovery was proposed by the *Windham* plaintiffs as a solution to these insurmountable manageability problems, but was squarely rejected by the court as an unconstitutional violation of due process:

> Nor, as the district judge held, can the difficulties inherent in proving individual damages be avoided by the use of a form of "fluid recovery." Such a method of computing damages in a class action has been appropriately branded as illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

Id. at 72, citing *Eisen*, 479 F.2d at 1018.

Like the Second and Fourth Circuits, the Ninth Circuit has found fluid class recovery to be unconstitutional. *See In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974). The *In re Hotel* plaintiff sought certification for a class of approximately four million persons who allegedly paid an illegal surcharge for telephone services due to a conspiracy between forty-seven hotel chains and six hundred individual hotels. *Id.* at 88. The plaintiffs argued that fluid recovery should be implemented to aggregate the damages of the individuals into a single claim. The court rejected the method and refused to certify the class, relying on the *Eisen* decision.

Yet, despite this strong federal court authority, the Illinois Appellate Court below failed even to address the constitutional problems created by fluid recovery. Indeed, nowhere in its opinion does the Appellate Court distinguish or even cite *Eisen*, *Windham*, or their progeny. Instead, the Appellate Court merely affirmed the trial court's embrace of the *Eisen* district court's rationale—that fluid recovery can dispense with individual proof of damages to

cure manageability problems. In addressing the Defendant's arguments that the class was unmanageable and the class action inappropriate, the panel below parroted reasoning already rejected by the Second Circuit in *Eisen* as unconstitutional. The panel noted, ". . . in the trial court's order granting class certification, the court approved the use of fluid recovery to *avoid the expected manageability problems*." (App. Ct. Op., A12) (emphasis added).

The Illinois Appellate Court based its application of fluid recovery upon *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982), a case which *refused to apply fluid recovery* in a non-certified class *settlement*. Nonetheless, the panel quoted *Simer* with approval:

> "The general inquiry is whether the use of [the fluid recovery] mechanism is consistent with the policy or policies reflected by the statute violated. This matter can be more particularized into an assessment of to what extent the statute embodies policies of deterrence, disgorgement, and compensation." (Footnotes omitted.) *Simer*, 661 F.2d at 676, quoted in *Cicelski v. Sears, Roebuck & Co.*, 132 Mich. App. 298, 307, 348 N.W.2d 685, 690-691 (1984).

(App. Ct. Op., A14). The court below apparently interpreted *Simer* as federal constitutional support for fluid class recovery.

Thus, the Illinois Appellate Court embraced the language of the Seventh Circuit in *Simer*, but utterly disregarded federal law in the Second, Fourth and Ninth Circuits finding fluid recovery unconstitutional. The Illinois Appellate Court's reading of *Simer*, at the very least, creates significant uncertainty in the law as to the constitutionality of fluid recovery.

II.

FLUID RECOVERY VIOLATES THE DUE PROCESS RIGHTS OF BOTH PETITIONER AND ABSENT CLASS MEMBERS BY FAILING TO PROVIDE NOTICE

The Illinois Appellate Court approved the use of fluid recovery to assess damages to the class as a whole, without making any provision for adequate notice to all class members prior to an adjudication on the merits. Such a procedure unconstitutionally deprives absent class members of notice, would bar absent out-of-state plaintiffs from bringing suit in their home states, and would effectively prevent such class members from participating in litigation and receiving compensation. Fluid recovery would lead to unconstitutional results.

Proper notice and the opportunity to be heard are fundamental elements of one's due process rights under the United States Constitution. U.S. Const. amend. XIV. This Court has held: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the *pendency* of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). *See also Client Follow-Up Co. v. Hynes*, 105 Ill. App. 3d 619, 434 N.E.2d 485, 489-90 (1982) (citing *Mullane*, 339 U.S. 306 (1950)).

The proposed use of fluid recovery in this case would dispense with notice. Plaintiffs seek to skirt the essential element of notice and opportunity to be heard by delaying notice to absent class members until after the court has determined liability and aggregate damages to the class as a whole. Plaintiffs, in short, place due process on the back burner. This is but a pretext for ignoring the notice requirements altogether, postulating that class

members will be notified *after* damages are aggregated, and their attorneys' contingency calculated. Such a practice certainly is not "notice reasonably calculated . . . to apprise interested parties of the *pendency* of the action[.]" *Mullane*, 339 U.S. at 314 (emphasis added). Indeed, as one court has stated: "To give notice to class members after a decision on the merits is to give notice after the reasons for giving it have ceased to exist." *Client Follow-Up*, 105 Ill. App. 3d at 627, 434 N.E.2d at 490.

Adequate notice to putative class members is essential because that single proceeding will bind all class members—even those who remain absent—as a final adjudication on the merits. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805-06 (1985). The fluid recovery mechanism approved by the lower court dispenses with notice and in doing so violates absent class members' right to due process. Without affording absent class members due process, Illinois courts may not exercise jurisdiction.

III.

THE ILLINOIS APPELLATE COURT'S APPROACH IS ENTIRELY INCONSISTENT WITH THIS COURT'S PRECEDENT IN *PHILLIPS PETROLEUM v. SHUTTS*

This Court has held that absent plaintiffs in a class action are entitled to due process protection, particularly in multi-state actions where other states may have an interest in applying their own laws. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Without providing such protection, Illinois courts lack authority to decide this case. *Id.*

The Illinois courts may not assert personal jurisdiction over absent class members without proper notice or evidence of sufficient contacts to Illinois, and any attempt to do so is directly contrary to *Phillips Petroleum*. *See Phillips Petroleum*, 472 U.S. at 811-12. The present litiga-

tion encompasses a nationwide class of diverse members, scattered about the country, linked only by their consumption of Petitioner's orange juice over a decade ago. Undoubtedly, many of these consumers neither reside in Illinois, nor would they choose to litigate an action in Illinois. Nonetheless, the judgment of a Cook County trial court will be *res judicata*, barring all class members from petitioning their home state for relief. Indeed, the Full Faith and Credit provision of the United States Constitution would compel state courts to enforce a sister state's judgment.

The trial court faces difficult questions of choice of law which, in a nationwide class action, could be a Sisyphean task. In *Phillips Petroleum*, the Court held that it was arbitrary, unfair and a violation of due process for a Kansas court to apply Kansas law to all members of a nationwide class action where many class members had little or no relationship to the forum state. "Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by *each member of the plaintiff class*, contacts 'creating state interest,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)) (emphasis added). As Kansas lacked sufficient "interest" in claims relating to class residents of other states, especially where the substantive law of the states differed, the application of Kansas law classwide exceeded constitutional limits. *Phillips Petroleum*, 472 U.S. at 821-822.

As in *Phillips Petroleum*, the substantive laws of all fifty (50) states are potentially involved here. The Plaintiffs have alleged claims under the Illinois Consumer Fraud Act *and* "similar 'Little F.T.C. Acts' enacted in every other state," (Complaint, Count III, A35-36), and the Illinois Appellate Court specifically held that the Illinois Consumer Fraud Act applies to the entire nationwide class. (App. Ct. Op., A10).

The trial court may not rest comfortably in the assumption that only Illinois law shall apply. State law under the Consumer Fraud Act varies significantly among the states.[3] Thus, one would be hard-pressed to claim that Illinois had a compelling interest over citizens of other states, who purchased juice from supermarkets in other states, sufficient to warrant the application of Illinois law alone.

On the other hand, if the courts of a foreign state deny the Illinois court's judgment full faith and credit, the due process rights of *Petitioner* are violated. Without adequate notice and an opportunity for absent plaintiffs to recover, this litigation would be of questionable *res judicata* effect. Courts in other jurisdictions would be hard-pressed to bar their unnotified citizens from suit because Plaintiffs litigated the case in Illinois—especially if there is an adverse judgment there. Thus, the risk of inconsistent results and multiple damage claims is very real, a danger against which due process protects. *See e.g., Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (defendant denied due process when compelled to relinquish property without assurance it would not be held liable in later suit brought by one not bound by first judgment).

Since fluid recovery ignores due process, Petitioner could find itself defending multiple and non-binding class action lawsuits across the nation. Whether another state gives full faith and credit to a decision by the Circuit Court of Cook County, Illinois in this case or not, fluid class recovery is manifestly unfair and violates established principles of due process of law. Such a result would burden Petitioner as well as the courts.

---

[3] For example, Iowa has no consumer protection act; Georgia prohibits class actions under its consumer protection act; Arkansas does not provide for private remedies under its consumer protection act; and New York authorizes treble damages. (A47-55).

IV.

THE COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS APPELLATE COURT'S APPLICATION OF FLUID RECOVERY VIOLATES PETITIONER'S DUE PROCESS RIGHTS BY PUNISHING PETITIONER AS A CRIMINAL WITHOUT THE NECESSARY CONSTITUTIONAL PROCEDURAL SAFEGUARDS

It is imperative that this Court grant review of the Illinois Appellate Court's decision because the use of fluid recovery impermissibly transforms this civil action into a criminal proceeding by imposing what amounts to criminal sanctions upon Petitioner without providing corresponding criminal procedural safeguards. Such a transformation is a clear violation of Petitioner's due process rights and thus, a violation of the United States Constitution.[4]

---

[4] While this Court has held that the award of punitive damages does not violate the due process clause of the Fourteenth Amendment, *Pacific Mutual Life Insurance v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991), the effect of fluid recovery on Petitioner's due process rights differs substantially from the effect of punitive damages. Traditionally, punitive damages cannot be awarded absent a finding of actual damages. *Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983). Thus, punitive damages are specifically tied to, and follow, the finding of actual damages. Fluid recovery, on the other hand, awards punitive-like damages *before* any actual damages have been proven. The fluid recovery damages in no way correspond to the actual damages. In fact, in contrast to punitive damages, fluid recovery awards damages even if *no* injury is proven.

Likewise, the Court's holding that punitive damages do not violate the excessive fines clause of the Eighth Amendment, *Browning Ferris Industries v. Kelco*, 492 U.S. 257 (1989), is equally inapplicable to fluid recovery. The *Browning Ferris* Court refused to extend the excessive fines clause to punitive damages in private civil cases because it found punitive damages to be too far from the concerns of the Eighth Amendment. *Id.* at 275. However, unlike punitive damages, punishment is not merely the side effect, but ultimate goal of fluid recovery. The class action attorney, in essence, becomes a private prosecutor-for-hire to deter and punish conduct, without tailoring the remedy to proven damages.

The calculation of damages under fluid recovery completely disregards all civil procedural and remedial mechanisms, and instead focuses on traditionally accepted penal goals such as punishment, disgorgement, and deterrence. *See* LaFave & Scott, *Criminal Law*, pp. 22-24 (punishment and deterrence are typical goals of criminal law). Under the guise of remedying manageability problems of class actions, fluid recovery impermissibly relieves the class of the burden of proving individual injury or damage, and hence, effectively assesses criminal sanctions against Petitioner without any criminal procedural safeguards. Fluid recovery thus unconstitutionally deprives Petitioner of its due process rights under the Fourteenth Amendment.

The mechanism of fluid class recovery is inherently criminal-like. It assesses injury to a large unidentifiable group—tantamount to the general public—and punishes the alleged offenders by requiring them to pay damages not only to parties that can prove their injury, but also to parties who allege but cannot prove an injury, and to others still who never even allege an injury. The system unavoidably results in windfalls to non-class members and deprivations to some absent class members. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1010-11 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

In effect, fluid recovery acts to protect society in general by penalizing an alleged offender to the benefit of large sections of society, whether harmed or not. This is nothing less than criminal law at work. The aim of criminal law is to protect the public against harm by punishing harmful results of conduct, or at least situations which are likely to result in harm if allowed to proceed. LaFave & Scott, *supra*, at 11. In contrast, the function of tort law, the area of law in which class actions (and, correspondingly, fluid recovery) should fall, is to *compensate* someone for the harm *he has already suffered. Id.*

The predominant effect is that criminal sanctions are imposed, while criminal procedural safeguards are bypassed. This, in and of itself, is a violation of Petitioner's due process rights. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (where sanctions in a civil proceeding are essentially criminal, the safeguards of criminal proceedings must be employed to preserve due process rights). In determining that the sanction at issue was a punishment, and, hence, constitutionally required procedural safeguards incident to a criminal prosecution, the *Mendoza-Martinez* Court looked at (1) the congressional intent in passing the act and (2) the "tests traditionally applied" to determine whether an action was penal in nature. *Id.* at 167-68. The traditional tests the Court examined included:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69.

Several of the "traditional tests" of punishment analyzed and present in *Mendoza-Martinez* are evident in the Illinois Appellate Court's application of fluid recovery. First, fluid recovery was intended to promote traditional aims of punishment. The appellate court specifically authorized its use to implement "policies of deterrence, disgorgement and compensation" (App. Ct. Op., A15). Also, the behavior to which fluid recovery applies is already a crime. Adulteration of food products is monitored by the Food & Drug Administration and specifically prohibited and criminal-

ized under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 331 (1988). In fact, the former owners of Bodine's Inc., Edward Boden, Sr. and Edward Boden, Jr. have already been criminally convicted and punished for the adulteration of orange juice.

More importantly, the most influential reason behind the *Mendoza-Martinez* Court's decision, *intent* that the sanction be a punishment, is equally present in the Illinois Appellate Court's application of fluid recovery. The *Mendoza-Martinez* Court found that the primary function of the statute was to serve as an additional penalty for a special category of draft evaders. *Id.* at 169-70. Analogously, it is clear that in adopting the use of fluid recovery, the court below intended to fashion a punishment. The court's primary purpose was to provide an additional penalty by allowing damages, without proof of individual injuries, against defendants who transact with large unidentifiable groups. Thus, fluid recovery unconstitutionally imposes a criminal sanction in civil proceedings. The Illinois court's concern for consumers, while admirable, is not sufficient to overcome the urgency to preserve due process rights.

As the court below chose to apply fluid class recovery, then it must also apply corresponding criminal procedural safeguards. Punishment cannot be constitutionally imposed otherwise. Consequently, Petitioner has a right to a higher standard of proof, a right to confrontation of witnesses, and a right to protection from double jeopardy. U.S. Const. amend. V. The court has failed to provide these protections and Petitioner's due process rights thus have been violated.

V.

IMPOSITION OF FLUID RECOVERY BY THE ILLINOIS APPELLATE COURT SUBSTANTIALLY ALTERS THE SUBSTANCE OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT IN VIOLATION OF THE SUPREMACY CLAUSE

The application of fluid recovery below is inconsistent with the explicit statutory language of the RICO statute, 18 U.S.C. § 1964, alleged in the Complaint. The RICO statute is designed solely to provide a civil mechanism to allow injured victims to obtain compensation. By its terms, civil RICO requires individual proof of damages:

> *Any person injured* in his business or property by reason of a violation of [RICO] may sue therefor—and shall recover threefold *the damages he sustains* and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1988) (emphasis added). The civil RICO statute is by design *remedial* in nature. The mere finding of violation without *proof of injury* cannot create liability.

When first enacting the civil RICO statute, the Senate Judiciary Committee emphasized that the statute was remedial—it was designed to compensate the *injured*:

> [I]t must be emphasized that these remedies are not exclusive, in that title IX [civil RICO] seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil . . . [T]itle IX, it must again be emphasized, is remedial rather than penal.

Senate Report of the Committee on the Judiciary, Sen. Rep. No. 617, 91st Cong., 1st Sess. 81-82 (1969).

The Judiciary Committee further compared the civil remedial purpose of RICO to that of the antitrust laws:

> What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adapting the civil remedies developed in the antitrust field to the problem of organized crime.

Id., p. 80-81.

Yet fluid recovery, instead of compensating those who have been injured in the past, punishes defendants by forcing them to provide a windfall to those who have never been harmed. Thus, what purports to be no more than a state procedural device, in fact significantly changes federal substantive rights in abrogation of the Supremacy Clause of the United States Constitution, art. VI, cl. 2.

This Court has steadfastly guarded the legislative province of Congress from encroachment by the judiciary. For instance, where Congress enacts legislation that provides no private remedy, federal courts may not create such a remedy, thereby enlarging their jurisdiction. *California v. Sierra Club*, 451 U.S. 287 (1981). In *Sierra Club*, this Court held that legislative silence in the Rivers and Harbors Appropriation Act, 33 U.S.C. § 403, banning the creation of any obstructions in navigable waters not authorized by Congress, did not provide a private right of action:

> The federal judiciary will not engraft a remedy on a statute, no matter how salutory, that Congress did not intend to provide.

Id. at 297. A contrary result—one that would allow the federal judiciary to imply a private right of action when Congress fails to express such an intent—risks inconsistent and incorrect determinations of legislative intent,

judicial power, and the federal system. As stated in *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring), "[It is] dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor."

The fact that fluid recovery arguably may be labeled as a procedural device does not shield it from constitutional challenge. As this Court noted in *Felder v. Casey*, 487 U.S. 131 (1988) the "federal right cannot be defeated by the form of local practice." *Id.* at 138, citing *Brown v. Western R. Co. of Alabama*, 339 U.S. 294 (1949). In *Felder*, the Court struck down as unconstitutional a Wisconsin statute requiring 120 days notice to state agencies and officers prior to filing suit against them for violation of the federal civil rights laws. Although the Wisconsin statute was "procedural," it nonetheless acted as "a substantive condition on the right to sue governmental officials and agencies. . . ." *Id.*, at 152. "Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court." *Id.* at 153.

The federal judiciary may not supplement federal statutes with remedies that Congress did not expressly intend; *a fortiori*, neither may an Illinois state court. However, that is precisely what has happened below. The dangers of which this Court forewarned in *Sierra Club*, *Thompson*, and *Felder* would be repeated or exacerbated should state courts, through a facile determination of legislative intent, succeed in implying federal statutory remedies that Congress did not specifically intend. "[O]nly if the federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952).

The Illinois Court of Appeals rationalized its application of fluid recovery through *dicta* in *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982), which held that the policies of fluid recovery—deterrence, disgorgement, and compensation—must be consistent with the policies reflected by the statute violated.[5]

The application of fluid recovery here however, unconstitutionally amends the express language of the RICO statute, and hence thwarts Congressional intent. Every statute that contemplates the award of money damages can be said to reflect policies of punishing the wrongdoer and compensating the injured. However, this superficial determination of legislative intent does not justify disregard of explicit statutory language. Insofar as fluid recovery dispenses with individual proof of injury, it is inconsistent with the explicit language of the federal civil RICO statute.

It is well established that under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state law is nullified to the extent it conflicts with federal law. *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982).

---

[5] The Illinois Appellate Court specifically held that "fluid recovery is available in *at least* the claim brought under the Consumer Fraud Act," suggesting that fluid recovery will be applied to the other asserted claims. (App. Ct. Op., A15) (emphasis added). The practical outcome of the Illinois Appellate Court's holding, however, is that fluid recovery has certified the class to pursue all allegations in the complaint. Dissolving the class and maintaining numerous individual actions under the RICO claim while maintaining a single class action under state law claims would present a convoluted and wholly unnecessary procedure. The effect of the court's decision, therefore, is that the preemption issues still remain under RICO. The Illinois Appellate Court failed to specify that its decision regarding the constitutionality of fluid recovery was limited to the one state statutory claim *alone*. The Illinois Appellate Court should not be permitted to insulate itself from review through imprecision. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The fact that the state regulation may reflect important state policies does not prevent federal preemption. *Free v. Bland*, 369 U.S. 663, 666 (1962); *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981).

Therefore, the importance in Illinois of general policies of deterrence, disgorgement, and compensation—at least as those policies are implemented in a fluid class recovery—are of no avail when in conflict with the language of federal law. Although Congress equally sought to advance the interest of compensation, it did so in the RICO statute only by first requiring individual proof of harm. As fluid recovery dispenses with such proof, Illinois must yield to Congressional design, and refuse to apply fluid recovery in this action. The Supremacy Clause of the U.S. Constitution requires no less.

Numerous federal courts have found fluid recovery to be inconsistent with the civil remedy provisions of federal antitrust law—the very law which Congress drew upon when enacting civil RICO. *See* Senate Report of the Committee on the Judiciary, *supra*; *Windham v. American Brands*, 565 F.2d 59, 65 (4th Cir. 1977). (" 'The language that Congress used in this statute . . . leaves no room for awarding damages to some amorphous 'fluid class' rather than, or in addition, to one or more actually injured persons.' " quoting Handler, *Twenty-fourth Annual Antitrust Review*, 72 Col. L. Rev. 1, 37 (1972)); *In re Hotel Telephone Charges*, 500 F.2d 86, 92 (9th Cir. 1974) ("[T]he Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large." [citation omitted]).

Considerations of disgorging ill-gotten gains, punishing wrongdoers, and deterring illegal conduct are presumed by the judiciary in every case involving economic damages. But these considerations do not justify the disregard of specific statutory language requiring proof of injury. As stated in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 130 (9th Cir. 1973), *cert. denied sub nom. Morgan v. Automobile Mfrs. Assoc.*, 414 U.S. 1045 (1973):

> Insofar as the common weal was injured the federal government was the proper party to seek redress. . . . If the Government did not prosecute its actions with sufficient vigor, the remedy lies in executive or legislative reform, not in judicial overreaching.

If the current federal law does not adequately protect the public, Congress, not the state judiciary, should act to reform the law. The state judiciary may not amend what Congress enacted because of its view of public policy.[6] A contrary result would run afoul of the Federal Supremacy Clause.

VI.

THE U.S. SUPREME COURT MAY PROPERLY EXERCISE ITS JURISDICTION OVER THIS CASE UNDER 28 U.S.C. § 1257

Congress has granted this Court the authority to review final judgments or decrees of the highest state court in

---

[6] Congress has considered amending the Federal Trade Practices Act, upon which the Consumer Fraud Act is based, to address the very problem of large consumer class actions which the trial and Appellate Court attempted to resolve through fluid recovery. Yet, these amendments have all died in the Senate Commerce Committee. *See e.g.*, 4 C.A.R. 3, 11-16, 4 C.A.R. 181, 187-194, and 4 C.A.R. 342-346 (1975).

which a judgment could be had. 28 U.S.C. § 1257(a) (1988).[7] This Court has consistently given the finality requirement a "practical," rather than a technical construction. *Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963). As the cases have unfolded, the Supreme Court has entertained jurisdiction in instances where the highest state court has finally determined the federal issue, even though further proceedings are pending in lower state courts.

This Court has adopted such a flexible approach, because it recognizes that an unyielding application of the finality requirement would unnecessarily require parties to await complete resolution of the proceedings below, even as to collateral matters. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 477 (1975). This Court in *Cox* identified four categories of cases in which it could exercise its appellate jurisdiction, despite the pendency of further proceedings in the state courts. In the fourth category of cases—the category in which the present petition falls—the Court identified the following criteria: (1) The state courts must have finally resolved the federal issue, despite the pendency of further state court proceedings; (2) the possibility exists that the party seeking review will prevail on nonfederal grounds in those further proceedings,

---

[7] "§ 1257. State courts; appeal; certiorari. (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

thereby mooting the federal issue; (3) reversal on the federal issue by this Court would terminate the litigation; and (4) failure to review immediately would seriously erode federal policy. *Cox*, 429 U.S. at 482-83. Since its decision in *Cox*, this Court has continually expressed its willingness to review cases which, while lacking technical finality, fall within the parameters of this category. *See e.g., Southland v. Keating*, 465 U.S. 1 (1984); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Like those decisions, the instant case meets all of the specified criteria, and therefore fits squarely within *Cox's* fourth category.

A. The Decisions of the Illinois Supreme Court and the Illinois Appellate Court Declaring Fluid Recovery to Be Constitutional Finally Resolve That Federal Issue.

In the present case, the federal issue—the constitutionality of fluid recovery—has already been finally decided in the state courts. The Illinois Appellate Court specifically held fluid recovery to be a constitutional means to avoid class manageability problems. (App. Ct. Op., A13). Petitioner filed a petition for appeal to the Illinois Supreme Court. That court denied the petition, thereby finally determining, for all practical purposes, the constitutionality of fluid recovery in Illinois.

Under Illinois law, a party may petition the Illinois Supreme Court for review either as a matter of right or request leave to appeal. Ill. Rev. Stat. ch. 110A, ¶¶ 315, 317. (A42-44). A petition for appeal as a matter of right must raise a question under the Constitution of the United States or of Illinois, and the Illinois Supreme Court's jurisdiction is non-discretionary. Ill. Rev. Stat. ch. 110A, ¶ 317. However, jurisdiction over a petition for leave to appeal is a matter of the Illinois Supreme Court's discretion. Ill. Rev. Stat. ch. 110A, ¶ 315. Illinois Supreme Court Rule 317 specifically authorizes appeals in the alternative.

Under this process, Petitioner sought review both as a matter of right on the federal and state constitutional issues, and alternatively, for leave to appeal. Because the appeal was sought in part as a matter of right, the Illinois Supreme Court did not have discretion to decline review. Its refusal to hear the case may be viewed, then, as an affirmation of the appellate court's ruling on the constitutionality of fluid recovery. Therefore, not only has Petitioner exhausted the appeals process in Illinois, but Illinois' highest court has finally determined the federal issue.[8]

B. Petitioner May Prevail on Nonfederal Grounds, Thereby Mooting the Federal Issue.

If proceedings in the present case were to continue in state court, there exists the very real possibility that petitioner could prevail on nonfederal grounds. For example, petitioner could prevail with a finding of non-liability at trial.

This case is, then, identical to *Cox* itself, as well as to the post-*Cox* line of cases in this Court. In all of those decisions this Court, in exercising review, emphasized the danger that the state court's interpretation of federal law could be insulated from later review in the Supreme Court by state court resolution in favor of the petitioner on nonfederal grounds.

[8] It is by no means a prerequisite to the Supreme Court's jurisdiction that the highest state court have rendered an opinion. In *Citizens & So. National Bank v. Bougas*, 434 U.S. 35 (1977), the state appellate court granted an interlocutory appeal, but the state supreme court denied certiorari. Nonetheless, the Court exercised its jurisdiction under 28 U.S.C. § 1257, in effect hearing an interlocutory appeal from the state appellate court.

C. Reversal of the Decision of the Illinois Appellate Court on Fluid Recovery Would End This Litigation.

The third element of the *Cox* test, that reversal of the state court's finding would end this litigation, also applies in the instant case. The class action here was found manageable and therefore certified only on the assumption that fluid recovery would be available. Otherwise, the proof and award of damages would be impractical and the class unmanageable. This class action would therefore effectively end if the state court decision on the constitutionality of fluid class recovery were reversed.

D. The Failure to Review the Decision of the Illinois Appellate Court Would Seriously Erode Federal Policy.

Finally, the refusal immediately to review the Illinois courts' resolution of the federal issues would seriously erode federal policy. The constitutional principles implicated by this case are fourfold: first, fluid recovery violates the due process rights of both Petitioner and the absent members of the plaintiff class; second, it disrupts the orderly administration of law in other states by attempting to bind class members, who have no contacts with Illinois, to an Illinois adjudication, in violation of this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); third, it violates due process by effectively transforming a civil case for compensation into a criminal prosecution to punish and deter, without the concomitant constitutional protections; and fourth, it contradicts the federal RICO statute by relieving Respondents of the obligation of proving damages. In light of the seriousness of the constitutional flaws of the ruling of the appellate court below, that ruling should not be permitted to stand.

CONCLUSION

The decision of the Illinois Appellate Court is the first Illinois case expressly to uphold and allow use of fluid recovery against constitutional challenge. Unless this Court exercises review at this point, there is a serious danger that the state court's decision will stand as a precedent for future litigation, without any opportunity for this Court to correct the state courts' misinterpretation of federal constitutional and statutory law.

Respectfully submitted,

GERALD D. SKONING
Counsel of Record
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorney for Petitioner

Of Counsel:

HAROLD C. WHEELER
KATHLEEN M. DILLON
WARREN VON SCHLEICHER
LINDA P. KURTOS
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON

APPENDIX

INDEX TO APPENDIX

	PAGE
Illinois Appellate Court Opinion	A1
Illinois Supreme Court Denial of Appeal	A16
Circuit Court of Cook County Order	A17
Plaintiffs' Third Amended Complaint	A20
U.S. Constitution, article IV, section 1	A41
U.S. Constitution, article VI, clause 2	A41
U.S. Constitution, amendment XIV	A41
18 U.S.C. § 1964 (1988)	A41
Ill. Rev. Stat. ch. 110A, ¶ 315	A42
Ill. Rev. Stat. ch. 110A, ¶ 317	A43
Ill. Rev. Stat. ch. 110, ¶¶ 2-801 *et seq.*	A44
Ark. Code Ann. §§ 4-88-101 through 4-88-112 (Michie 1991)	A47
Ga. Code Ann. §§ 10-1-390 *et seq.*	A50
N.Y. Gen. Bus. Law § 349 (McKinney 1988)	A54
Statement Pursuant to Supreme Court Rule 29.1	A56

Fourth Division
December 26, 1991

Nos. 1-90-3609/
1-90-3610

PAT GORDON, CATHERINE THOMAS, SAM GORDON, and MICHELLE CHROMAN, on behalf of herself as next friend for her minor children, ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated,	) APPEAL FROM THE) CIRCUIT COURT OF) COOK COUNTY.
Plaintiffs-Appellees,	)
v.	)
EDWARD BODEN, SR., BODINE'S, INC., EDWARD BODEN, JR., ROGER J. WALSH, JR., DOMINICK'S FINER FOODS, INC., CERTIFIED GROCERS WAREHOUSE, INC., and TREASURE ISLAND FOODS, INC., individually and as representatives of a class; and THE KROGER CO.,	)
Defendants,	)
and	)
EDWARD BODEN, SR., BODINE'S, INC., and EDWARD BODEN, JR.,	) HONORABLE) ROBERT L.) SKLODOWSKI
Defendants-Appellants.	) JUDGE PRESIDING.

JUSTICE LINN delivered the opinion of the court:

Plaintiffs, Pat Gordon, Sam Gordon, Catherine Thomas, and other named plaintiffs brought a class action in the Circuit Court of Cook County. Plaintiffs represent a nationwide class of consumers who bought adulterated orange juice products that were processed by defendant Bodine's, Inc. Bodine's corporate officers were defendants Edward Boden, Sr., and Edward Boden, Jr.

The trial court granted plaintiffs' motion for class certification. The court also certified a question for review that pertains to the assessment and distribution of damages among class members.

We affirm the order of the trial court in all respects.

Background

The record shows that in July 1989 the Bodens and Roger Walsh, Jr., were charged in a multi-count Federal indictment with selling adulterated food. As part of a plea agreement, they pled guilty to some of the charges. On February 27, 1990, the United States District Court for the Northern District of Illinois sentenced each of the Bodens to a prison term, a fine, and community service. (Walsh was sentenced the preceding week.)

On the day that the Bodens were sentenced in Federal court, plaintiffs filed their third amended complaint in Cook County Circuit Court. The pleading alleged as follows. Until 1985, Bodine's, Inc. (now known as McCain's OJ), was the largest processor of frozen orange juice in the Midwest. Bodine's corporate officers were the Bodens and Walsh. Defendants processed orange juice products, i.e., 100% orange juice, orange juice from concentrate, and frozen orange juice.

Between 1978 and 1985, defendants adulterated these orange juice products "with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost inferior ingredients." Despite the adulteration, defendants knowingly affixed false labels to its product containers, representing that the products were processed from 100% orange juice. The complaint also named as defendants several retail grocery chains that bought the adulterated orange juice products from Bodine's and resold them to consumers. Plaintiffs also alleged that defendants intentionally concealed the adulteration from consumers.

Based on the foregoing acts, plaintiffs' six-count complaint sought damages under the following theories: breach of express warranty and implied warranty of merchantability (see Ill. Rev. Stat. 1989, ch. 26, pars. 2-313, 2-314), statutory fraud (see Ill. Rev. Stat. 1989, ch. 121-1/2, par. 261 *et seq.*), common law fraud, and violation of the Federal Racketeer Influenced and Corrupt-Organizations Act (RICO) (see 18 U.S.C. § 1961 *et seq.*).

On December 7, 1990, the trial court entered an order pertaining to several matters in the litigation. The court dismissed from the action the retail grocery chains. The court certified the following class:

> All persons in the United States who purchased at retail adulterated orange juice products manufactured or sold by Bodine's, Inc., other than the defendants. The defendants remaining in the case are Edward Boden, Sr., Edward Boden, Jr., and Bodine's, Inc.

The trial court also certified the following question for review:

> whether what is commonly known as "fluid recovery" (various mechanisms involving the assessment of damages to the class as a whole followed by its distribution in the manner most likely to result in benefit

to the injured population) is permissible in a class action in Illinois.

The court found that the use of fluid recovery would substantially facilitate and expedite the litigation. The court also found that "the recoveries of hundreds of thousands or millions of class members" would likely be defeated if the procedure were not permissible. We granted leave to appeal. See 134 Ill. 2d R. 308.

Opinion

I

The parties initially disagree as to the court's scope of review. Plaintiffs contend that we must restrict our review solely to the precise question certified by the trial court. Defendants, however, contend that we may review the trial court's order granting class certification. It is true that a reviewing court generally should limit an interlocutory appeal under Supreme Court Rule 308 (134 Ill. 2d R. 308) to the question certified by the trial court. (*People v. Pollution Control Board* (1984), 129 Ill. App. 3d 958, 965, 473 N.E.2d 452, 456-57). However, it is settled that a trial court may use Rule 308 as a means of reviewing an order granting class certification at an early stage of the litigation. *Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583, 590-91, 376 N.E.2d 1377, 1379-80.

In the case at bar, we conclude that the certified question, which pertains to the assessment and distribution of damages among class members in general, necessarily includes the question of the propriety of the class certification in the present case. We cannot neatly compartmentalize and independently resolve one issue and not the other. (See *Frank*, 71 Ill. 2d at 592, 376 N.E.2d at 1380). Therefore, we will answer the certified question in the course of reviewing the class certification.

II

Section 2-801 of the Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, par. 2-801), formerly section 57.2 of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 57.2), governs class actions in Illinois. For an action to be maintained as a class action, a trial court must find four prerequisites: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class which predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. Ill. Rev. Stat. 1989, ch. 110, par. 2-801.

The class action statute essentially codifies Illinois case law. (*Hoover v. May Department Stores Co.* (1978), 62 Ill. App. 3d 106, 114, 378 N.E.2d 762, 769, *rev'd on other grounds* (1979), 77 Ill. 2d 93, 395 N.E.2d 541; K. Forde, *Illinois's New Class Action Statute*, 59 Chi. Bar Rec. 120, 135 (1977).) Thus, a court may seek guidance in pertinent cases decided prior to the statute's enactment. (*Eshaghi v. Hanley-Dawson Cadillac Co.* (1991), 214 Ill. App. 3d 995, 999-1000, 574 N.E.2d 760, 763.) However, it must be remembered that "[w]ith the advent of the statute many of the prior decisions have become corpses." *Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 338, 371 N.E.2d 634, 643.

In deciding whether to certify a class, a court may consider "any matters of fact or law properly presented by the record, including the pleadings, depositions, affidavits, answers to interrogatories and any evidence that may have been adduced at the hearings." (*Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.* (1985),

137 Ill. App. 3d 84, 100, 484 N.E.2d 349, 360-61, *aff'd.* (1986), 114 Ill. 2d 278, 499 N.E.2d 1319.) Certification of a class is within the sound discretion of the trial court and will be disturbed only if there is an abuse of that discretion or if impermissible legal criteria are applied. *Purcell & Wardrope Chartered v. Hertz Corp.* (1988), 175 Ill. App. 3d 1069, 1074, 530 N.E.2d 994, 997.

Turning to the first prerequisite of section 2-801, defendants do not dispute that the class is so numerous that joinder of all members is impracticable. The trial court found that class members could potentially total in the "hundreds of thousands or millions." Obviously, any attempt to join such a large number of plaintiffs in a single suit would render the suit unmanageable and, in contrast, multiple separate claims would be an imposition on the litigants and the courts. (*Steinberg*, 69 Ill. 2d at 337, 371 N.E.2d at 642-43; *Hoover*, 62 Ill. App. 3d at 114, 378 N.E.2d at 769.) Further, as one commentator has observed:

> In cases where there is a substantial number of potential claimants and the individual amounts of their claims are relatively small, Illinois courts have tended to permit the claims to proceed as a class action. Forde, 59 Chi. Bar Rec. at 122.

We hold that the first prerequisite of section 2-801 is established.

Turning to the second prerequisite of section 2-801, defendants contend that the record does not establish the existence of predominant questions of fact or law common to the class. Defendants initially assert that a successful adjudication of a class representative's individual claim would not establish a right to recovery in any other class member. Defendants posit that each class member's purchase of an adulterated orange juice product involved

a unique set of facts, such as the exact type of item purchased, the particular retail grocery store where the item was purchased, the date it was purchased, the label the item bore, the purchase price, and each consumer's reliance on defendants' misrepresentations. Thus, defendants reason, each class member would be required to testify to establish a right to recovery, *i.e.*, defendants' liability. Defendants argue, therefore, that a class action cannot be maintained.

We cannot accept defendants' argument. Our supreme court has explained that section 2-801(2) of the class action statute "is couched in the disjunctive—'common questions of fact *or* law.' It does not, therefore, require the presence of both a common question of fact and a common question of law." (*Miner v. Gillette Co.* (1981), 87 Ill. 2d 7, 17, 428 N.E.2d 478, 483.) "So long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class, the statutory requisite is met." *Steinberg*, 69 Ill. 2d at 338, 371 N.E.2d at 643.

We conclude that this test has been met in the case at bar. The record shows the existence of at least one question common to the class that predominates over questions affecting individual class members. That question is simply whether defendant adulterated its orange juice products and committed the other fraudulent acts as alleged. In *Brooks v. Midas-International Corp.* (1977), 47 Ill. App. 3d 266, 361 N.E.2d 815, we held as follows:

> A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to an entire class. In such circumstances, the common class questions still predominate the case, and the class action is not defeated. [Citations.] 47 Ill. App. 3d at 273, 361 N.E.2d at 820.

We further conclude that the other questions that defendants raise, pertaining to the exact circumstances of each class member's purchase, fail to show that the common question does not predominate.

The question of each class member's reliance on defendant's misrepresentation does not show that the common question does not predominate. Plaintiffs alleged, *inter alia*, that defendants violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act). (Ill. Rev. Stat. 1989, ch. 121-1/2, par. 261 *et seq.*) In *Brooks*, this court distinguished a class action that sought relief for a statutory fraud violation from a class action seeking relief under a common law fraud theory. We observed as follows:

> Under the common law, reliance was an element which had to be alleged in order to constitute a valid cause of action for misrepresentation or deceit. [Citations.] However, the language employed in the Consumer Fraud Act clearly indicates that it is the intent of the defendant in his conduct, not the reliance or belief of the plaintiff, which is the pivotal point upon which an action arises. [Citation.] Section 2 of the Act specifically provides that the question of whether a person has been misled, deceived or damaged is not an element of an action brought under the Act. If, after trial, it is found that defendant did engage in an unlawful practice in its advertising [footnote omitted], then the question common to all class members has been established in favor of plaintiffs. *Brooks*, 47 Ill. App. 3d at 272-73, 361 N.E.2d at 819-20.

Also, defendants contend that the common question does not predominate because each consumer paid a different price for a particular item. However, it is settled that "[t]he fact that the class members' claims for refunds may be in varying amounts which must be determined sepa-

rately does not necessarily mean that the common question does not predominate." *Society of St. Francis v. Dulman* (1981), 98 Ill. App. 3d 16, 18, 424 N.E.2d 59, 61, citing *Saldana v. American Mutual Corp.* (1981), 97 Ill. App. 3d 334, 422 N.E.2d 860.

Additionally, defendants posit that the trial court would have to apply to each purchase the substantive law of the state in which each class member bought the adulterated orange juice product. Defendants contend, therefore, that the common question is governed by the substantive law of possibly 50 states and does not predominate.

We disagree. The question of whether laws of different states apply to specific transactions alleged in a class action will not ordinarily prevent certification of the class. (*Purcell*, 175 Ill. App. 3d at 1075, 530 N.E.2d at 998). We initially note that if the trial court found that Illinois has significant contact to the claims asserted by each class member, the court could apply Illinois substantive law to this multi-state class action. This finding would ensure that the application of Illinois law is neither arbitrary nor unfair. (*Martin v. Heinold Communities, Inc.* (1987), 117 Ill. 2d 67, 82, 510 N.E.2d 840, 846-47 (and cases cited therein).) We further note that the trial court could simply divide the class into subclasses. (*Martin*, 117 Ill. 2d at 81-82, 510 N.E.2d at 846; *Miner*, 87 Ill. 2d at 17-18, 428 N.E.2d at 483-84.) "Moreover, if at some later time in the litigation the subclassification becomes unmanageable, the court, of course, always has the option to set aside the class certification or a portion of it." (*Purcell*, 175 Ill. App. 3d at 1075, 530 N.E.2d at 998.) At the most, this question constitutes a hypothetical problem that might arise in the future. As such, it is not a sufficient basis to refuse to certify an otherwise properly pleaded class action. See *Purcell*, 175 Ill. App. 3d at 1075, 530 N.E.2d at 998.

In their complaint and in their motion for class certification, plaintiffs list many questions which they claim are predominant and common to the class. We need not address each question *seriatim*. It suffices to say that plaintiffs' claim under the Consumer Fraud Act predominates and is common to the class. We note that the class action device "is flexible in nature and may be adjusted or modified by the trial court at a later point in the litigation to accommodate any changes or newly discovered facts as they arise." (*Purcell*, 175 Ill. App. 3d at 1076 n.2, 530 N.E.2d at 999 n.2.) Indeed, even a subsequent "determination that some members of a class are not entitled to relief because of some particular factor will not bar the classification." *Steinberg*, 69 Ill. 2d at 338, 371 N.E.2d at 643.

We also note that defendants cite *Reardon v. Ford Motor Co.* (1972), 7 Ill. App. 3d 338, 287 N.E.2d 519, in support of their argument. In *Steinberg*, our supreme court explained that the decision in *Reardon* rested at least in part on a common law requirement for class actions that was superseded by the class action statute. The *Steinberg* court questioned the precedential value of *Reardon* (69 Ill. 2d at 339-40, 371 N.E.2d at 644) and we do likewise. We hold that the second prerequisite of section 2-801 is established.

Turning to the third prerequisite of section 2-801, defendants claim that the named plaintiffs will not adequately represent the class. The purpose of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim. *Purcell*, 175 Ill. App. 3d at 1078, 530 N.E.2d at 1000; *Brooks*, 47 Ill. App. 3d at 274, 361 N.E.2d at 820.

In the case at bar, the interests of the named plaintiffs are the same as those of the absentee class members—to seek damages based on defendants' misrepresentations to consumers concerning their adulterated orange juice products. Further, the record shows that this is not a collusive action; rather, this is an adversary proceeding against defendants. If the adequacy of representation by the named plaintiffs is questioned at a later time, we repeat that the trial court could, if necessary, modify the class structure or decertify the class. (*Purcell*, 175 Ill. App. 3d at 1078-79, 530 N.E.2d at 1001.) We hold that the third prerequisite of section 2-801 is established.

Turning to the fourth prerequisite of section 2-801, defendants claim that a class action is not an appropriate method for the fair and efficient adjudication of the controversy. In applying this prerequisite in a particular case, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain. (Forde, 59 Chi. Bar Rec. at 128; see *Society of St. Francis*, 98 Ill. App. 3d at 19, 424 N.E.2d at 61-62.) Further, "[a] controlling factor in many cases is that the class action is the only practical means for class members to receive redress—particularly where the claims are small." Forde, 59 Chi. Bar Rec. at 128.

Applying these principles to the record before us, we conclude that a class action is appropriate in the case at bar. Initially, our holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled. (See *Steinberg*, 69 Ill. 2d at 339, 371 N.E.2d at 644.) Additionally, it must be remembered that this is a consumer class action. Our courts have recognized that, "[i]n a large and impersonal society,

class actions are often the last barricade of consumer protection." (*Eshaghi*, 214 Ill. App. 3d at 1004, 574 N.E.2d at 766.) The consumer class action is an inviting procedural device to address frauds that cause small damages to large groups. When brought by plaintiffs who have no other avenue of legal redress, the consumer class action provides restitution to the injured and deterrence to the wrongdoer. (*Hoover*, 62 Ill. App. 3d at 112, 378 N.E.2d at 768; see K. Ross, *Multistate Consumer Class Actions in Illinois*, 57 Chi.-Kent L. Rev. 397, 398 (1981).) Thus the ends of equity and justice are attained.

Defendants vigorously argue that a class action is not appropriate in the case at bar because the class is composed of a large number of unidentified individuals whose claims cannot be substantiated. Defendants cite cases in which courts have held that "insubstantial recoveries by class members, high administrative costs in relation to aggregate recovery and difficulty in corroborating claims are valid considerations in determining whether a class action is manageable." *Hayna v. Arby's Inc.* (1981), 99 Ill. App. 3d 700, 712, 425 N.E.2d 1174, 1184, citing *Adams v. Jewel Companies, Inc.* (1976), 63 Ill. 2d 336, 348 N.E.2d 161.

However, in the trial court's order granting class certification, the court approved the use of fluid recovery to avoid the expected manageability problems. The term "fluid recovery" refers to a procedural device used to avoid manageability problems in the calculation and distribution of damages in large class actions. Examples of such problems are where the persons injured are not likely to come forward and prove their claims, or where such persons cannot be given notice of the case. (*Simer v. Rios* (7th Cir. 1981), 661 F.2d 655, 675.) The mechanism generally consists of the following format:

> (1) the amount of damages incurred by the class as a whole is determined in a single adjudication, creating a damage fund; (2) individual member claimants capable of proving valid claims obtain their share of the fund; and (3) the unclaimed portion of the fund is applied to the class's benefit. [Citation.] (*Cicelski v. Sears, Roebuck & Co.* (1984), 132 Mich. App. 298, 304-05, 348 N.W.2d 685, 689.)

The third procedural step is the actual fluid recovery, which commonly assumes one of two forms. The remainder of the fund is: (1) distributed through the market, usually in the form of reduced charges, or (2) used to fund a project which will likely benefit class members. *Simer*, 661 F.2d at 675; *Cicelski*, 132 Mich. App. at 305, 348 N.W.2d at 689; see generally Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1516-23 (1976).

Defendants argue that the fluid recovery mechanism violates the class action statute. Thus, according to defendants, the trial court's approval of the use of fluid recovery amounted to a *de facto* amendment of the statute. This brings us to the specific question certified by the trial court. We answer the question in the affirmative, and conclude that the fluid recovery mechanism is permissible in Illinois in appropriate cases.

Initially, we agree with other courts that the fluid recovery procedure is not inherently unconstitutional. In *Cicelski*, the Michigan Court of Appeals reviewed the several Federal cases that addressed the issue. The court agreed with a commentator that, absent issues that require individualized proofs, a defendant in a class action is not prejudiced by being restricted to only one hearing on common issues. Regarding the calculation of damages, " 'it has never been thought that due process required multiple hearings where there was one full and fair adjudication of the

merits.' " *Cicelski*, 132 Mich. App. at 306-07, 348 N.W.2d at 690, quoting Note, 89 Harv. L. Rev. at 1524-25.

Further, the court in *Cicelski* was persuaded by the approach taken by the United States Court of Appeals for the Seventh Circuit in *Simer*. We are likewise. In *Simer*, the court held as follows:

> We need not adopt either of the two extreme positions—that is, whether a fluid recovery always can be used to surmount problems in the going forward of a class action or whether a fluid recovery is per se unconstitutional. Rather, we believe that a careful case-by-case analysis of use of the fluid recovery mechanism is the better approach. In this approach, we focus on the various substantive policies that use of a fluid recovery would serve in the particular case. The general inquiry is whether the use of such a mechanism is consistent with the policy or policies reflected by the statute violated. This matter can be more particularized into an assessment of to what extent the statute embodies policies of deterrence, disgorgement, and compensation. (Footnotes omitted.) *Simer*, 661 F.2d at 676, quoted in *Cicelski*, 132 Mich. App. at 307, 348 N.W.2d at 690-91.

After reviewing the record before us, we conclude that fluid recovery is appropriate in the case at bar. Plaintiffs allege, *inter alia*, that defendants violated the Consumer Fraud Act. (Ill. Rev. Stat. 1989, ch. 121-1/2, par. 261 *et seq.*). "The Act is a regulatory and remedial enactment intended to curb a variety of fraudulent abuses and to provide a remedy to individuals injured by them." (*Scott v. Association for Childbirth at Home, International* (1981), 88 Ill. 2d 279, 288, 430 N.E.2d 1012, 1017.) Section 11a of the Act provides that "[the] Act be liberally construed to effect the purposes thereof." (Ill. Rev. Stat. 1989, ch. 121-1/2, par. 271a.) It is quite established that "[t]he provision is a clear mandate from the Illinois legis-

lature that our courts utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices and grant appropriate remedies to injured parties." (*People ex rel. Hartigan v. All American Aluminum & Construction Co.* (1988), 171 Ill. App. 3d 27, 33, 524 N.E.2d 1067, 1070, citing *Duhl v. Nash Realty, Inc.* (1981), 102 Ill. App. 3d 483, 495, 429 N.E.2d 1267, 1277; see *Warren v. LeMay* (1986), 142 Ill. App. 3d 550, 563, 491 N.E.2d 464, 471.) This legislative intent and mandate necessarily include policies of deterrence, disgorgement and compensation. Thus, we hold that fluid recovery is available in at least the claim brought under the Consumer Fraud Act.

In sum, the benefits of class certification in the case at bar, with the use of fluid recovery where appropriate, outweigh the tremendous burdens presented if the case proceeded without class certification. We hold that the fourth prerequisite of section 2-801 is established. After reviewing the entire record, we cannot say that the trial court exceeded its discretion in certifying the class.

For the foregoing reasons, the order of the circuit court of Cook County is affirmed.

Affirmed.

JIGANTI, P.J., and JOHNSON, J., concur.

IN THE SUPREME COURT OF ILLINOIS

March 27, 1992

73187—Pat Gordon et al., etc., respondents, v. Edward Boden, Sr., et al., etc. (Bodine's, Inc., petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 20, 1992.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAT GORDON, et al.,	)
	)
Plaintiffs,	)
	)
v.	) 89 CH 653
	)
EDWARD BODEN, SR., et al.,	) Judge Sklodowski
	)
Defendants.	)

ORDER

This matter coming before the Court on Plaintiffs' Motion for Class Certification, the Court having reviewed the briefs and heard oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED:

1. For the reasons and with the findings stated in open Court, the Court certifies a class with respect to the remaining defendants as requested by plaintiffs: All persons in the United States who purchased at retail adulterated orange juice products manufactured or sold by Bodines, Inc., other than the defendants. The defendants remaining in the case are Edward Boden, Sr., Edward Boden, Jr., and Bodines, Inc.

2. Pursuant to Illinois Supreme Court Rule 308, the Court finds that this order involves a question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The question of law is: whether what is commonly known as "fluid recovery" (various mechanisms involving the assessment of damages to the class as a whole followed by its distribution in the manner most likely to result in benefit to the injured population) is permissible in a class

action in Illinois. The Court believes that the course of the litigation and proofs that would be presented would be substantially facilitated and expedited if "fluid recovery" is available than if it is not available, and that the recoveries of hundreds of thousands or millions of class members would be likely to be defeated if "fluid recovery" were not permissible, allowing not more than a small proportion of the class to recover. There is no Illinois appellate decision squarely on point concerning "fluid recovery," and there is a division of authority in other jurisdictions as to the appropriateness, legality and constitutionality of "fluid recovery."

3. This order is entered *nunc pro tunc* as of December 6, 1990.

Dated: Dec. 7, 1990 /s/ Hon. Robert L. Sklodowski

Daniel A. Edelman
LAW OFFICES OF DANIEL A. EDELMAN
150 North Wacker Drive, Suite 1870
Chicago, Illinois 60606
(312) 201-1540
Atty. No. 12775

THE COURT: This Court feels that consumer protection requires or mandates the Court to attempt to disgorge wrongfully obtained profits.-That makes a compelling argument that transcends much of what the modern effect of class action seems to embody.

The so-called fluid recovery of damages suffered by a class as a whole is something that I think should be embraced by this jurisdiction as it was in California and as it was in the 7th Circuit.

Of course, the inquiry is whether the use of such a mechanism would be consistent with the policies of our consumer fraud statutes and similar consumer fraud statutes throughout the nation, and I think it's compatible. And the proof thus far is that the wrong inflicted upon the public were [sic] intentional.

In any event, this Court feels that as a deterrent that which predominates and almost overwhelms this matter that denial of a class certification would be a gross error.

Accordingly, this Court will certify a class. There are certainly common questions that predominate the of law, [sic] in fact. Liability can be calculated by calculating the amount of the defendants' ill-gotten gains, and eventually, after there is further discovery, certainly, a mechanism can be framed which will adequately distribute and determine what damages were suffered by not only Illinois residence [sic], but residence [sic] in other states.

This Court also finds that the plaintiffs are adequate representatives. This court also finds that the attorneys are adequate attorneys that have the ability to handle this matter. Therefore, the class is hereby certified.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

KARL HALPERIN, on behalf of himself and as next friend for his minor child JULIE SHAYNE HALPERIN; PAT GORDON; CATHERINE THOMAS; SAM GORDON; MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	89 CH 6531
	)	Judge Sklodowski
EDWARD BODEN, SR.; BODINE'S, INC., now known as MCCAIN'S OJ INC.; EDWARD BODEN, JR.; ROGER J. WALSH, JR.; DOMINICK'S FINER FOODS, INC.; CERTIFIED GROCERS WAREHOUSE, INC.; and TREASURE ISLAND FOODS, INC., individually and as representatives of a class; and THE KROGER CO.,	)	JURY DEMANDED
Defendants.	)	

THIRD AMENDED COMPLAINT

Plaintiffs, KARL HALPERIN, on behalf of himself and as next friend for his minor child JULIE SHAYNE HALPERIN; PAT GORDON; CATHERINE THOMAS; SAM

GORDON; MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children ADAM CHROMAN and MELISSA CHROMAN, suing individually and on behalf of all others similarly situated, complain as follows against defendants EDWARD BODEN, SR. ("Boden Sr."); BODINE'S, INC. ("Bodine's"); EDWARD BODEN, JR. ("Boden Jr."); ROGER J. WALSH, JR. ("Walsh"); DOMINICK'S FINER FOODS, INC. ("Dominick's"), CERTIFIED GROCERS WAREHOUSE, INC. ("Certified"); TREASURE ISLAND FOODS, INC. ("Treasure Island"); and THE KROGER CO. ("Kroger"). Dominick's, Certified, and Treasure Island ("resellers") are sued as representatives of a class of all resellers similarly situated, as defined below.

INTRODUCTION

1. This action arises from the misrepresentation of orange juice, orange juice from concentrate and frozen orange juice concentrate produced by Bodine's, Inc., which until 1985 was the largest processor of frozen orange juice concentrate in the Midwest. Between 1978 and 1985, Bodine's sold what was represented to be 100% orange juice, orange juice from concentrate and frozen orange juice concentrate (collectively, "orange juice products"). Bodine's, at the direction of Boden Sr., Boden Jr., and Walsh, adulterated the orange juice products with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost inferior ingredients, concealing the substitution from the public. The orange juice products were sold through Dominick's, Certified, Treasure Island, Kroger, and other stores under the Vita-Gold brand and the private brands of the various resellers. Of these stores, Kroger knowingly or recklessly sold adulterated orange juice products.

2. In this action, plaintiffs contend that (a) Bodine's, the three individuals that owned and controlled Bodine's, Kroger, and the resellers committed violations of the Illinois Consumer Fraud Act, *Ill.Rev.Stats.* [sic], ch. 121-1/2, § 261 et seq., and similar "Little FTC Acts" enacted in every other state (Count III), (b) Bodine's, the three individuals that controlled it, and Kroger committed common-law fraud (Count IV), (c) Bodine's, Kroger, and the resellers committed violations of express and implied warranties under the Uniform Commercial Code, *Ill.Rev.Stats.* [sic], ch 26, § 2-313 and § 2-314 (Counts I and II), (d) Kroger aided and abetted Bodine's overall violations of the "Little FTC Acts" and (Count V), and (e) Bodine's and the three individuals violated the federal RICO statute (Count VI).

PARTIES

3. Each of the plaintiffs purchased or consumed orange juice products of the brands and types that were subject to adulteration, as follows:

(a) Pat Gordon resided in Chicago and Highland Park, Illinois during the time the adulteration took place. She purchased liquid orange juice at Dominick's, Treasure Island, and a Certified store, including the Vita-Gold brand and house brands.

(b) Catherine Thomas resided in Hickory Hills, Illinois during the period in which the adulteration took place. She purchased liquid orange juice and frozen concentrate at Dominick's, including the Vita-Gold brand.

(c) Sam Gordon resided in Chicago, Illinois during the period in which the adulteration took place. He purchased frozen orange juice from concentrate and some liquid orange juice at Dominick's, including the Vita-Gold brand.

(d) Michelle Chroman resided in River Woods, Illinois during the period in which the adulteration took place. She purchased, on behalf of herself and her minor children Adam Chroman and Melissa Chroman, frozen orange juice from concentrate at Dominick's, including the Vita-Gold brand.

(e) Karl Halperin and Julie Shayne Halperin purchased orange juice products from Dominick's, under its private brand.

4. On information and belief, based on the magnitude and pervasive nature of the adulteration, each of the plaintiffs believes that he or she purchased adulterated orange juice manufactured by Bodine's. Each plaintiff believed the products purchased to be 100% orange juice products. Each member of the plaintiff class defined below likewise purchased the adulterated orange juice products.

5. Bodine's, now known as McCain's OJ, Inc., is an Illinois corporation. It manufactured adulterated orange juice products, some of which were sold under Bodine's Vita-Gold brand and some under numerous other brands.

6. Each of the following persons was an officer of Bodine's during the time the violations complained of were committed, and personally knew of, authorized, directed, and/or ratified the acts complained of herein.

(a) Edward Boden, Sr.

(b) Edward Boden, Jr.

(c) Roger J. Walsh, Jr.

7. Prior to November 1985, Boden Sr. owned 40% of Bodine's and Boden Jr. 40%. The remaining 20% was owned by the father of Roger J. Walsh, Jr.

8. Dominick's is a Delaware corporation authorized to do business in Illinois. Its registered agent and office are CT Corporation System, 208 S. LaSalle Street, Chicago, IL 60604.

9. Treasure Island is an Illinois corporation. Its registered agent and office are Christ Kamberos, 3460 N. Broadway, Chicago, IL 60657.

10. Certified is, on information and belief, a membership corporation owned by a number of supermarkets that do business under the name "Certified." Its principal place of business is located at 4800 S. Central Avenue, Chicago, Illinois 60638.

11. Certified exists for the purpose of serving as joint purchasing and distribution agent for its members. Its members can secure lower prices by pooling their requirements and purchasing jointly. Certified is not an independent link in the chain of distribution. It does not have the right to cease doing business with member stores at will. Profits that Certified makes that are not necessary for capital requirements are rebated to the member stores in the form of patronage dividends. Certified and its members are intended to and do in fact function as a single, integrated economic entity, being the equivalent of a supermarket chain.

12. Kroger is an Ohio corporation which does business in Illinois. Its registered agent and office are CT Corporation System, 208 S. LaSalle Street, Chicago, IL 60604-1135.

CLASS ALLEGATIONS – PLAINTIFF CLASS

13. Plaintiffs bring this action as a class action under §§ 2-801 et seq. of the Illinois Code of Civil Procedure. The class consists of:

> All persons in the United States who purchased at retail adulterated orange juice products manufactured or sold by Bodine's, Inc., other than the defendants.

14. The class is so numerous that joinder of all members is impracticable. Defendants marketed and sold adulterated orange juice products to thousands of persons.

15. There are questions of law and fact common to the class, including:

(a) Whether defendants sold adulterated orange juice products.

(b) Whether defendants committed unfair and deceptive trade practices by selling adulterated orange juice products.

(c) Whether defendants breached express warranties by selling adulterated orange juice products.

(d) Whether defendants breached implied warranties by selling adulterated orange juice products.

(e) Whether defendants fraudulently concealed their sale of adulterated orange juice products.

(f) Whether the public could reasonably have been expected to learn of the adulteration scheme prior to the indictment of defendants Boden Sr., Boden Jr., and Walsh in July, 1989.

(g) Whether Kroger knowingly or recklessly resold adulterated orange juice products, thereby rendering Kroger liable not only for its own sales, but for all sales of adulterated orange juice products.

16. These common questions predominate over any individual issues. The central issues in the case are whether Bodine's and the individual defendants adulterated orange juice products and whether the other defendants sold those products.

17. Plaintiffs will fairly and adequately represent the claims of the class. Plaintiffs' counsel are experienced and successful in class action litigation, including products liability class actions, and can carry out the responsibility of counsel in class action litigation. Plaintiffs are committed to vigorously protecting the rights of the class.

18. A class action is an appropriate method for the fair and efficient adjudication of this controversy.

CLASS ALLEGATIONS – DEFENDANT CLASS

19. Plaintiffs bring this action against a class of defendants, defined as follows:

> All firms which purchased and resold adulterated orange juice products manufactured or sold by Bodine's, Inc., whether at retail or wholesale.

Defendants Certified, Dominick's and Treasure Island, and the defendant class, are collectively referred to as "resellers."

20. Based on press reports concerning the adulteration, plaintiffs allege that the defendant class is so numerous that joinder of all members is impracticable. According to a statement by Anton Valukas, then United States Attorney for the Northern District of Illinois, the adulterated product was sold through 155 supermarket chains.

21. There are questions of law and fact common to the class, including:

(a) The liability of each defendant class member for breach of express and implied warranties.

(b) The rights of the plaintiffs and plaintiffs' class against each defendant class member

(c) The effect of fraudulent concealment by Bodine's and the individual defendants on the liability of the defendant class.

(d) Whether the public could reasonably have been expected to learn of the adulteration scheme prior to the indictment of defendants Boden Sr., Boden Jr. and Walsh in July 1989.

22. These common questions predominate over any individual issues.

23. Plaintiffs have named as representatives of the defendant class three large firms who can be expected to vigorously litigate the issues affecting the defendant class in defending themselves.

24. A defendant class action is an appropriate method for the fair and efficient adjudication of this controversy.

CONDUCT COMPLAINED OF

25. Between 1978 and 1985, Bodine's sold what was represented on the containers to be 100% orange juice products. Under federal statutes and regulations, each container of orange juice product is required to be labeled as "orange juice," "frozen orange juice from concentrate," etc. Federal regulations also prescribe standards of identity for each of these products—for example, 21 C.F.R. § 146.146 prescribes the ingredients that "frozen concentrated orange juice" may contain—and require that the ingredients be listed on the labels.

26. The "orange juice products" sold by Bodine's were in fact adulterated with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost, inferior ingredients. These ingredients were not permitted to be included in the products by the federal regulations prescribing the standards of identify [sic] for each product, and were not listed on the labels.

27. "Orange juice products" containing these adulterants are at best inferior in value to products which conform to the applicable standards of identify. [sic] Plaintiffs believe that they were of no value, in that a person who desired to purchase artificial orange drink products would purchase one of the numerous artificial orange drink products that were on the market at all relevant times, generally at prices much cheaper than the prices of pure orange juice products.

28. The adulterated orange juice products were sold through Dominick's, Treasure Island, Certified, Kroger, and other stores under the Vita-Gold brand and the private brands of the various supermarkets.

29. The volume of adulterated orange juice products that was sold was massive. For example, between July 1982 and July 1983, Bodine's purchased over 188,000 gallons of evaporator waste water for inclusion in "orange juice products." Between 1983 and 1985, Bodine's purchased approximately 37.5 million pounds of beet sugar from one source for inclusion in "orange juice products." Between January 1985 and March 1985, Bodine's purchased another 937,000 pounds of beet sugar from another source for inclusion of "orange juice products." A third source furnished 1.6 million pounds of beet sugar during the first six months of 1985, and a fourth 4.2 million pounds during the same period.

30. Between 1978 and 1985, Bodine's sales increased from approximately $3 million per anum to approximately $100 million per anum. Bodine's achieved this remarkable increase in sales by selling its product significantly more cheaply than other major producers of orange juice products. On information and belief, Bodine's was able to do this in large part by adulterating its products.

31. As a result, Bodine's became the largest producer of "orange juice products" in the Midwest.

32. Bodine's rapidly acquired a reputation in the food industry for adulterating citrus products. Plaintiffs are informed and believe that any supermarket chain would have been a recipient of such reports. These allegations are based on information supplied by the Florida Department of Citrus, a state agency.

33. During the period 1978-85, scientific tests existed that could detect adulterants in orange juice products. Information concerning these tests and the manner in which they should be performed was available in trade and professional journals, such as the Journal of Food Science, the Journal of the Association of Official Analytical Chemists, and publications of the American Chemical Society.

34. Bodine's engaged in this conduct at the direction of, and was aided and abetted by, Boden Sr., Boden Jr., and Walsh.

35. In December 1989, the individual defendants pleaded guilty to federal criminal charges arising from the adulteration.

FRAUDULENT CONCEALMENT AND DISCOVERY

36. Defendants Bodine's, Boden Sr., Boden Jr., Walsh and Kroger concealed the sale of adulterated orange juice products from the public, by knowingly affixing false labeling to Bodine's products. These representations were repeated to the public by each of the resellers when they resold orange juice products bearing the false labeling.

37. Each of the resellers knew or reasonably should have known that Bodine's was or may have been adulterating orange juice products, in that Bodine's had a reputation in the food industry for adulterating citrus products and Bodine's was selling at unusually low prices compared to other major producers. The resellers either tested food products that they sold or could readily have arranged for such testing.

38. Each of the resellers was in privity with Bodine's. Each of the resellers had a right to indemnification from Bodine's for any breach of warranty with respect to the goods, under § 2-607(5) of the Uniform Commercial Code.

39. Concealment was essential to and inherent in the successful sale of the adulterated products as 100% orange juice products. If there are any persons who would be willing to consume beet sugar, corn sugar, monosodium glutamate, and other low-cost, inferior ingredients, they would not have purchased 100% orange juice products, and would not have paid the price of 100% orange juice products. Furthermore, since the sale of adulterated foods is a criminal offense and can result in the seizure of the adulterated products by state and federal regulatory agencies, it was imperative that the adulterated character of the products not be known.

40. The public did not, and could not reasonably have been expected to, learn of the adulteration scheme until late July, 1989, when Boden Sr., Boden Jr., and Walsh were indicted in the United States District Court for the Northern District of Illinois.

41. As a result, any applicable statute of limitations is tolled under the doctrine of fraudulent concealment.

ADDITIONAL INVOLVEMENT OF KROGER

42. Kroger was a major reseller of the adulterated orange juice products. Kroger resold them under the Cost Cutter and Avondale brand names.

43. In May 1983, attorneys for the Florida Department of Citrus contacted Kroger, advised it that samples of Cost Cutter frozen concentrated orange juice containing adulterants had been found in a Kroger store, and requested that Kroger participate in a testing program. Kroger declined to so participate. The Cost Cutter brand is Kroger's house brand.

44. On information and belief, Kroger purchased the adulterated orange juice products from Bodine's at such unusually low prices in relation to other major volume sellers of orange juice products that they were placed on notice of the suspicious character of Bodine's products and should have arranged for their testing.

45. On information and belief, Kroger acquired knowledge of facts indicating that it was reselling adulterated orange juice products manufactured by Bodine's as a result of:

(a) Laboratory tests performed as early as 1979-80.

(b) In April 1982, a Kroger lab supervisor recommended that Bodine's be dropped as an approved supplier. The recommendation was not acted upon.

(c) Warnings from the Florida Department of Citrus, an agency of the State of Florida.

(d) Communications with the Federal Food & Drug Administration during 1983.

(e) In 1983, the FDA seized a substantial quantity of Bodine's orange juice products, some of it packed under Kroger labels, based on findings that it was adulterated.

46. In June 1983, after Kroger learned of the FDA's seizure of adulterated orange juice products manufactured by Bodine's and packed under Kroger labels, Kroger wrote to the Associate FDC Commissioner for Regulatory Affairs complaining that "this seizure action was unwarranted, was an unnecessary waste of taxpayer's funds, and will damage Kroger's reputation and the value of the two brand names involved." The FDA action was attributed to "pressures generated by various parties on behalf of the Florida citrus industry."

47. Thereafter, Kroger continued to sell orange juice products purchased from Bodine's. Had Kroger disclosed the scheme, or pursued appropriate inquiries after being placed on notice of possible adulteration, the scheme would have been aborted.

48. Kroger also continued to sell products with knowledge of the facts set forth above.

49. Kroger engaged in these actions so that it could continue to purchase orange juice products at unusually low prices.

50. By continuing to sell orange juice products with knowledge of their adulterated character, and by attempt-

ing to forestall the Food & Drug Administration, Kroger entered into express or tacit collusion with Bodine's and the individuals controlling Bodine's, or recklessly disregarded facts placing it on notice of possible adulteration, and is jointly and severally liable with them for their sales and/or the entire market share.

COUNT I – EXPRESS WARRANTY

51. Plaintiffs incorporate ¶¶ 1-50 by reference.

52. Each package of adulterated orange juice product represented, on its container, that it was 100% orange juice product. This representation, as a result of the federal regulations prescribing standards of identity for orange juice products, constitutes a representation that the product sold conforms to the applicable federal standard of identity. Each package of adulterated orange juice product also stated on its container what purported to be a complete list of its ingredients.

53. These representations were made directly to plaintiffs and the class members. Each plaintiff and class member received them when they purchased the containers of orange juice products which they purchased. The representations were part of the basis of the bargain with respect to each purchase of the adulterated product. Each purchase of the purported 100% orange juice products was made in reliance on the representation that the products being purchased were 100% orange juice products.

54. These representations constituted an express warranty by Bodine's and each reseller that the products sold were 100% orange juice products that conformed to the applicable federal standards of identity and contained only those ingredients listed on the containers.

55. Defendants Bodine's, Kroger, and the resellers breached their express warranty, in that the product sold was not 100% orange juice product, did not conform to the applicable federal standards of identity, and consisted in large part of ingredients that were not listed on the containers and were inferior in value to the listed ingredients.

56. Plaintiff and each class member has been damaged by defendants' breach of warranty in the manner described above.

COUNT II – IMPLIED WARRANTY OF MERCHANTABILITY

57. Plaintiffs incorporate ¶¶ 1-50 by reference.

58. Plaintiffs and the class members are purchasers of goods for purposes of Article 2 of the Uniform Commercial Code.

59. Bodine's, Kroger, and each reseller was a merchant of food products. As merchants, these defendants made certain implied warranties under UCC § 2-314, including:

(a) That the purported 100% orange juice products conformed to the promises or affirmations of fact in the products' packagings or labelling. The affirmations of fact included the statement of the product, which incorporates a federal standard of identity, and the list of ingredients on each container, which is required to be complete and accurate.

(b) That the orange juice products were of fair average quality and passed in the food business and trade as 100% orange juice products.

60. Said defendant have breached their warranties, in that the purported 100% orange juice products were adul-

terated, did not conform to the promises and affirmations of fact on the packaging, were not of fair average quality for 100% orange juice products, and did not pass in the food business as such.

61. Plaintiffs and the class members have been damaged by said defendants' breach of warranty in the manner described above.

COUNT III – LITTLE FTC ACTS

62. Plaintiffs incorporates ¶¶ 1-50 by reference.

63. At all relevant times, § 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, *Ill.Rev.Stats.* [sic] ch. 121-1/2, ¶ 262, provided that "[U]nfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful . . . ." Similar statutes, patterned after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and prohibiting unfair or deceptive acts or practices, exist in every other state.

64. Defendants Bodine's, Boden Sr., Boden Jr., Walsh, Kroger and the resellers deceptively represented that the adulterated products were 100% orange juice products, with the intent that purchasers would rely on the representations.

65. Defendants Bodine's, Boden Sr., Boden Jr., Walsh, Kroger and the resellers failed to disclose the fact that the adulterated orange juice products were adulterated. This omission was made with the intention of inducing the purchase of the adulterated orange juice products.

66. Defendants Bodine's, Boden Sr., Boden Jr., Walsh, Kroger and the resellers thereby engaged in unfair or deceptive acts or practices.

67. As a result of these unfair or deceptive acts or practices, the adulterated orange juice products were purchased by plaintiffs and the class members.

68. As a result of these unfair or deceptive acts or practices, plaintiffs and the class members were damaged, as described above.

69. The public did not, and could not reasonably have been expected to, learn of the adulteration scheme until late July 1989, when Boden Sr., Boden Jr., and Walsh were indicted in the United States District Court for the Northern District of Illinois.

COUNT IV – FRAUD

70. Plaintiffs incorporate ¶¶ 1-50 by reference.

71. Defendants Bodine's, Boden Sr., Boden Jr., Walsh and Kroger repeatedly represented in packaging and otherwise that the products they were selling were 100% orange juice products.

72. By representing that a container was filled with, for example, "orange juice," defendants represented that the contents conformed to the federal standard of identity for "orange juice."

73. By listing certain ingredients on the container—for example, "orange juice" in the case of "orange juice"—defendants represented that the listed ingredients were the only ingredients in the container.

74. The products that these defendants sold were not in fact 100% orange juice products, but were adulerated as described above.

75. These defendants made the representations described above with knowledge of or in reckless disregard of their falsity.

76. Defendants' representations and omissions were made with the intent that plaintiffs and the class members would rely on them by purchasing the purported 100% orange juice products.

77. These representations were made directly to plaintiffs and the class members, by means of affixing them to each container of adulterated product.

78. Plaintiffs and the class members relied on these defendants' representations. No reasonable individual would intend to purchase a conglomeration of beet sugar and other adulterants, while paying the price of genuine 100% orange juice products.

79. As a result of these representations and omissions, plaintiffs and the class members were induced to pay money.

COUNT V – KROGER'S LIABLITY UNDER LITTLE FTC ACTS FOR AIDING AND ABETTING BODINE'S

80. Plaintiffs incorporate ¶¶ 1-50 by reference.

81. At all relevant times, § 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, *Ill.Rev.Stats.* [sic], ch. 121-1/2, ¶ 262, provided that "[U]nfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful . . . ." Similar statutes, patterned after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and prohibiting unfair or deceptive acts or practices, exist in every other state.

82. Kroger aided and abetted the conduct of Bodine's, Boden Sr., Boden Jr. and Walsh, by engaging in the acts, described above, which facilitated the continuation of their adulteration scheme.

83. Kroger thereby engaged in unfair or deceptive acts or practices.

84. As a result of these unfair or deceptive acts or practices, the adulterated orange juice products were purchased by plaintiffs and the class members.

85. As a result of these unfair or deceptive acts or practices, plaintiffs and the class members were damaged, as described above.

COUNT VI – RICO

86. Plaintiffs incorporate ¶¶ 1-50 by reference.

87. This count is brought against defendants Bodine's, Boden Sr., Boden Jr. and Walsh.

88. The knowing sale of adulterated orange juice products, representing on the labels that they are genuine orange juice products, constitutes a scheme or artifice to defraud within the meaning of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

89. On information and belief, the United States mails were used in connection with the sale of the adulterated orange juice products, in placing orders for the products and obtaining the purchase price of the products.

90. On information and belief, interstate wire transmissions were used in connection with the sale of the adulterated orange juice products, in placing orders for the products.

91. All of these uses of the mails and wires took place in the ordinary course of business, were foreseeable by all defendants, and were in furtherance of the ultimate objective of the fraudulent transaction—to obtain money.

92. Bodine's is, and was during the time of the sale of the adulterated orange juice products, an enterprise within the meaning of 18 U.S.C. § 1961(4). Its activities affected interstate commerce. Bodine's sold orange juice products in numerous states, shipping the product from Illinois into those other states.

93. Bodine's participated as a principal in this scheme and then used the proceeds of the scheme in its operations, in violation of 18 U.S.C. § 1962(a). Execution of the scheme materially assisted Bodine's in increasing its revenues and prolonging its business.

94. Boden Sr., Boden Jr. and Walsh each conducted the affairs of Bodine's through the scheme, in violation of 18 U.S.C. § 1962(c).

95. Plaintiffs and the class members were injured in their business or property as a result of these violations, in that they purchased adulterated orange juice.

WHEREFORE, plaintiffs requests the following relief:

(A) That this Court enter an order certifying this action as a class action.

(B) That this Court require defendants and the defendant class to pay plaintiffs and each plaintiff class member the damages they suffered, trebled in the case of Bodine's and the individual defendants under Count VI.

(C) That this Court require defendants Bodine's, Boden Sr., Boden Jr., Walsh and Kroger, jointly and severally, to pay punitive damages to plaintiffs and each plaintiff class member in an amount that the Court deems just and appropriate.

(D) That this Court require defendants and the defendant class to pay reasonable attorney's fees, litigation expenses, and costs.

(E) That the Court provide such other and further relief as is just and appropriate.

Lawrence Walner

Daniel A. Edelman

LAWRENCE WALNER & ASSOCIATES, LTD.
321 N. Clark Street
Suite 3150
Chicago, Illinois 60610
(312) 527-9494
Atty. no. 10264 (LW)
12775 (DAE)

United States Constitution

ARTICLE IV. *Section 1.* Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

ARTICLE VI. *Clause 2.* Supreme Law of Land. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV — Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 1964

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest

himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Illinois Revised Statutes, Chapter 110A

315. (Supreme Court Rule 315). Leave to Appeal From the Appellate Court to the Supreme Court

(a) *Petition for Leave to Appeal; Grounds.* Except as provided below for appeals from the Industrial Commission division of the Appellate Court, a petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a mat-

ter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed. However, no petition for leave to appeal from a judgment of the five-judge panel of the Appellate Court designated to hear and decide cases involving review of Industrial Commission orders shall be filed, unless at least one judge of that panel files a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court. A motion asking that such a statement be filed may be filed as a prayer for alternative relief in a petition for rehearing, but must, in any event, be filed within the time allowed for filing a petition for rehearing.

317. (Supreme Court Rule 317). Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by Rule 315, except that the petition shall be entitled "Petition for Appeal as a Matter of Right", item (1) of the petition shall state that the appeal is taken as a matter of right, and item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right. In other respects the procedure is governed by Rule 315. If leave to appeal is to be sought in the alternative, the request therefor must be included in the same petition, and item (1) thereof shall include an alternative prayer for leave to appeal, and item (5) the argument as to why in the alter-

native leave to appeal should be allowed as a matter of sound judicial discretion. When both appeal as a matter of right and leave to appeal are sought, both requests will be disposed of by a single order. If the court allows the petition, briefs, and abstracts in cases in which they are required, shall be filed as provided in the case of appeal by leave under Rule 315.

Illinois Revised Statutes, Chapter 110

2-801. *Prerequisites for the maintenance of a class action*

§ 2-801. Prerequisites for the maintenance of a class action. An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

2-802. *Order and findings relative to the class*

§ 2-802. Order and findings relative to the class.

(a) Determination of Class. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

(b) Class Action on Limited Issues and Subclasses. When appropriate, an action may be brought or main-

tained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly.

2-803. *Order and findings relative to the class*

§ 2-803. Notice in class cases. Upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

An order entered under subsection (a) of Section 2-802 of this Act, determining that an action may be maintained as a class action, may be conditioned upon the giving of such notice as the court deems appropriate.

2-804. *Intervention by and exclusion of class members*

§ 2-804. Intervention by and exclusion of class members. (a) Intervention. Any class members seeking to intervene or otherwise appear in the action may do so with leave of court and such leave shall be liberally granted except when the court finds that such intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class.

(b) Exclusion. Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the action shall not apply to persons who properly request to be excluded.

2-805. *Judgments in class cases*

§ 2-805. Judgments in class cases. Any judgment entered in a class action brought under Section 2-801 of this Act shall be binding on all class members, as the class is defined by the court, except those who have been properly excluded from the class under subsection (b) of Section 2-804 of this Act.

2-806. *Dismissal or compromise of class cases*

§ 2-806. Dismissal or compromise of class cases. Any action brought as a class action under Section 2-801 of this Act shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct.

ARKANSAS CODE OF 1987
TITLE 4. BUSINESS AND COMMERCIAL LAW
SUBTITLE 7. CONSUMER PROTECTION
CHAPTER 88. DECEPTIVE TRADE PRACTICES

4-88-101. Applicability of chapter.

This chapter does not apply to:

(1) Advertising or practices which are subject to and which comply with any rule, order, or statute administered by the Federal Trade Commission;

(2) Broadcasters, printers, publishers, and other persons engaging in the dissemination of information who do not have actual knowledge of the intent, design, purpose, or deceptive nature of the advertising or practice;

(3) Actions or transactions permitted under laws administered by the State Insurance Commissioner, Arkansas Securities Commissioner, Arkansas Public Service Commission, Arkansas State Highway Commission, Bank Commissioner, or other regulatory body or officer acting under statutory authority of this state or the United States, unless a director of these divisions specifically requests the Attorney General to implement the powers of this chapter.

* * * *

4-88-108. Concealment, suppression, or omission of material facts.

The act, use, or employment by any person of any deception, fraud, or false pretense, or the concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the sale or advertisement of any goods or services is declared to be an unlawful practice.

* * * *

4-88-111. Investigations—Procedure—Confidential information.

(a) When the Attorney General determines that an investigation should be made as to whether a person has

engaged in, is engaging in, or shows evidence of intent to engage in any practice declared to be unlawful by this chapter, when he receives a request for enforcement proceedings from a consumer or labor organization, better business bureau, chamber of commerce, or any state agency, or when he receives a written complaint from a consumer of a practice declared to be unlawful under this chapter, he may:

(1) Require that person to file a statement or report in writing as to the facts and circumstances concerning the matter, together with such other data as may be reasonably related thereto;

(2) Examine under oath, or take the deposition of any person in connection with the matter;

(3) Examine any merchandise, or sample thereof, sales tickets, or other records relating thereto.

(b) Unless otherwise ordered by a court for good cause shown, no statement or documentary material produced pursuant to a demand under this section shall be produced for inspection or copying by, nor shall the contents thereof be disclosed to, any person other than the authorized employee of the Attorney General without the consent of the person who produced the material.

(c) The Attorney General or any attorney designated by him may use the documentary material or copies thereof in the enforcement of this chapter by presentation before any court, provided that any such material which contains trade secrets shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing such material. However, when material containing trade secrets is presented with court approval, the material and the evidence pertaining thereto shall be held in camera and shall not be part of the court record or trial transcript.

4-88-112. Failure to cooperate in investigations—Proceedings.

(a) In the event any person fails or refuses to file a statement, appear, or produce records as required by § 4-88-111, the Attorney General, acting through the Consumer Counsel, may file, in the chancery court of the county in which the person resides or transacts business or of the judicial district in which the State Capitol is located, a petition for an order of such court for the civil enforcement of such section.

(b) Upon the filing of the petition and service upon the person, the court shall have jurisdiction to hear and determine the matter so presented and to enter such order, including temporary injunctions, as may be required to effectuate this chapter.

(c) Willful concealment, destruction, alteration, or falsification of any documentary material which would be subject to subpoena by the court or the disobedience of any order of the court is declared to be unlawful and shall be punished as contempt of court.

(d) Any final order shall be subject to appeal to the Supreme Court of Arkansas.

CODE OF GEORGIA

TITLE 10. COMMERCE AND TRADE
CHAPTER 1. SELLING AND OTHER TRADE PRACTICES
ARTICLE 15. DECEPTIVE OR UNFAIR PRACTICES
PART 2. FAIR BUSINESS PRACTICES ACT

10-1-390. Short title.

This part shall be known and may be cited as the "Fair Business Practices Act of 1975."

(GA. L. 1975, p. 376, s 1.)

10-1-391. Purpose and construction of part.

(a) The purpose of this part shall be to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state. It is the intent of the General Assembly that such practices be swiftly stopped, and this part shall be liberally construed and applied to promote its underlying purposes and policies.

(b) It is the intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended.

* * * *

10-1-399. Civil or equitable remedies by individuals.

(a) Any person who suffers injury or damages as a result of consumer acts or practices or as a result of office supply transactions in violation of this part or whose business or property has been injured or damaged as a result of consumer acts or practices or as a result of office supply transactions in violation of this part may bring an action individually, but not in a representative capacity,

against the person or persons engaged in such unlawful consumer acts or practices or in such unlawful office supply transactions under the rules of civil procedure to seek equitable injunctive relief and to recover his general and exemplary damages sustained as a consequence thereof in any court having jurisdiction over the defendant; provided, however, exemplary damages shall be awarded only in cases of intentional violation. Notwithstanding any other provisions of law, a debtor seeking equitable relief to redress an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, upon facts alleged showing a likelihood of success on the merits, may not, within the discretion of the court, be required to make a tender. Nothing in this subsection or paragraph (20) of subsection (b) of Code Section 10-1-393 shall be construed to interfere with the obligation of the debtor to a lender who is not in violation of paragraph (20) of subsection (b) of Code Section 10-1-393. A claim under this Code section may also be asserted as a defense, setoff, cross-claim, or counterclaim or third-party claim against such person.

(b) At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be delivered to any prospective respondent. Any person receiving such a demand for relief who, within 30 days of the delivering of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning this rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. The demand requirements of this subsection shall not apply if the prospective respondent does not maintain a place of business or does not keep assets within the state. The 30 day requirement of this subsection shall not apply to a debtor seeking a temporary restraining order to redress or prevent

an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, provided that said debtor gives, or attempts to give the written demand required by this subsection at least 24 hours in advance of the time set for the hearing of the application for the temporary restraining order. Such respondent may otherwise employ the provisions of this Code section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this Code section. All written tenders of settlement such as described in this subsection shall be presumed to be offered without prejudice in compromise of a disputed matter.

(c) Subject to subsection (b) of this Code section, a court shall award three times actual damages for an intentional violation.

(d) If the court finds in any action that there has been a violation of this part, the person injured by such violation shall, in addition to other relief provided for in this Code section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and expenses of litigation incurred in connection with said action; provided, however, the court shall deny a recovery of attorneys' fees and expenses of litigation which are incurred after the rejection of a reasonable written offer of settlement made within 30 days of the mailing or delivery of the written demand for relief required by this Code section; provided, further, that, if the court finds the action continued past the rejection of such reasonable written offer of settlement in bad faith or for the purposes of harassment, the court shall award attorneys' fees and expenses of litigation to the adverse party. Any award of attorneys' fees and expenses of litigation shall become a part of the judgment and subject to execution as the laws of Georgia allow.

(e) Any manufacturer or supplier of merchandise whose act or omission, whether negligent or not, is the basis for action under this part shall be liable for the damages

assessed against or suffered by retailers charged under this part. A claim of such liability may be asserted by cross-claim, third-party complaint, or by separate action.

(f) It shall not be a defense in any action under this part that others were, are, or will be engaged in like practices.

(g) In any action brought under this Code section the administrator shall be served by certified or registered mail with a copy of the initial complaint and any amended complaint within 20 days of the filing of such complaint. The administrator shall be entitled to be heard in any such action, and the court where such action is filed may enter an order requiring any of the parties to serve a copy of any other pleadings in an action upon the administrator.

* * * *

CONSOLIDATED LAWS OF NEW YORK
GENERAL BUSINESS LAW
CHAPTER 20 OF THE CONSOLIDATED LAWS
ARTICLE 22-A-CONSUMER PROTECTION FROM DECEPTIVE ACTS AND PRACTICES

§ 349. Deceptive acts and practices unlawful

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

(c) Before any violation of this section is sought to be enjoined, the attorney general shall be required to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him, unless the attorney general shall find, in any case in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest.

(d) In any such action it shall be complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade com-

mission or such department, division, commission or agency or the federal courts.

(e) Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement.

(f) In connection with any proposed proceeding under this section, the attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.

(g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

In compliance with this Court's Rule 29.1, a list of parent corporations of Bodine's, Inc. follows: McCain Citrus, Inc., McCain U.S.A., Inc. and McCain Foods Limited. Bodine's, Inc. has no subsidiaries.